

**DEPARTMENT OF TOXIC SUBSTANCES CONTROL  
HAZARDOUS WASTE MANAGEMENT PROGRAM  
POLICY AND PROCEDURE**

**POLICY AND PROCEDURE: EO-02-003-PP** (Supersedes EO-95-004-PP, EO-92-001-MM, EO-93-023-MM, and EO-92-004-MM)

**TITLE: Enforcement Response Policy**

**AFFECTED PROGRAMS: Office of Legal Counsel and Criminal Investigations, Office of Pollution Prevention and Technology Development, Administrative Services Program, Hazardous Waste Management Program**

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## **I. PURPOSE**

This document sets forth a violation classification system and summarizes the enforcement options that the Department of Toxic Substances Control (DTSC) may pursue for violations of the Hazardous Waste Control Law (HWCL) and its implementing regulations. This policy allows flexibility to choose appropriate enforcement options based upon the circumstances of each case and the potential of the selected option to promote compliance. To assist violators to return to compliance and to initiate and complete enforcement actions in a timely manner, this policy provides completion schedules for steps in the enforcement process. This policy also addresses DTSC's practices to encourage respondents to enter into settlement discussions.

## **II. POLICY STATEMENT**

It is the policy of DTSC to implement its enforcement actions to accomplish the following goals:

- Promote compliance throughout the regulated community;
- Treat generators, transporters, and operators of storage, treatment, transfer, and disposal facilities equally and consistently with regard to the same types of violations;
- Return violators to compliance in a timely manner;
- Penalize violators, as appropriate, and deprive violators of any economic benefit gained from non-compliance; and
- Initiate and conclude enforcement activities in a timely manner.

## **III. STATUTORY BASIS**

DTSC's enforcement authority is established in article 8 of chapter 6.5 of division 20 of the Health and Safety Code, section 25180, et seq. Various sections of the HWCL provide enforcement authority, mandate certain actions by DTSC and its staff in specific situations, and detail the rights, responsibilities and liabilities of persons subject to the HWCL.

#### **IV. RELATIONSHIP TO OTHER DOCUMENTS**

This document should be used in conjunction with other United States Environmental Protection Agency (U.S. EPA), California Environmental Protection Agency (Cal/EPA) and DTSC documents, including the following:

- Policy and Procedure for Preparing Enforcement Orders (EO-02-008-PP)
- Permit Writer's Manual
- Policy and Procedure for Inspections (EO-02-006-PP)
- Management Memorandum, "Authority to Conduct Permit and Enforcement Actions" (EO-02-001-MM)
- Guidelines for Calculating the Economic Benefit of Noncompliance (EO-02-001-GD)
- Policy and Procedure for Complaints (EO-02-007-PP)
- Cal/EPA Policy on Incentives for Self-Evaluation, March 8, 1993
- U.S. Environmental Protection Agency, "EPA Supplemental Environmental Projects Policy," effective May 1, 1998
- Management Memorandum, "Referrals to California Compliance School" (MM-95-005)
- Policy and Procedure for Collecting Overdue Administrative Penalties (EO-02-005-PP)

#### **V. ROLES AND RESPONSIBILITIES**

This section outlines the general roles and responsibilities of DTSC Branches, Divisions, Offices, and staff.

##### Deputy Director, Hazardous Waste Management Program (HWMP)

- Sign enforcement settlements of any amount, as appropriate.
- Negotiate settlements of enforcement actions, as appropriate given the circumstances of the case.

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- Counsel staff, and consult with the Director as needed, on appropriate response actions and settlements in complex, sensitive or controversial cases.

Division Chief

- Sign administrative enforcement orders for any cases with or without an assessed penalty, as appropriate.
- Sign enforcement settlements of less than \$1,000,000, as appropriate.
- Negotiate settlements of enforcement actions, as appropriate given the circumstances of the case.
- Counsel staff, and consult with the Deputy Director as needed, on appropriate response actions and settlements in complex, sensitive or controversial cases.

Branch Chief

- Concur and sign off on litigation referral packages.
- Sign administrative enforcement orders for any cases with an assessed penalty, as appropriate.
- Sign enforcement settlements for \$250,000 or less, as appropriate.
- Negotiate settlements of enforcement actions, as appropriate given the circumstances of the case.
- Counsel staff, and consult with Division Chief as needed, on appropriate response actions and settlements in complex, sensitive or controversial cases.
- Sign schedules of compliance.
- Make referrals of enforcement actions to other agencies.
- Ensure that the integrities of the regional inspection, complaint and enforcement databases are maintained.

Section Chief (Supervisor)

- Review and approve violation classifications, enforcement responses, and penalties.

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- Review and approve inspection reports and statements of fact.
- Sign administrative enforcement orders for cases that have an assessed penalty of \$50,000 or less subject to review and approval by the Branch Chief.
- Sign enforcement settlements of \$50,000 or less subject to review and approval by the Branch Chief.
- Negotiate settlements of enforcement actions.
- Monitor enforcement referrals and negotiate actions with the Attorney General (AG) until adjudicated.
- Oversee return of violators to compliance on enforcement actions and/or settlements.
- Submit data for entry into the inspection, complaint, and/or enforcement databases.

Senior Hazardous Substances Scientist and Senior Hazardous Substances Engineer

- Determine violation classifications, enforcement responses, and penalties.
- Prepare, review, approve, and sign statements of fact.
- Prepare and sign, or approve for signature administrative enforcement orders for cases that have an assessed penalty of \$50,000 or less subject to review and approval by the Branch Chief.
- Prepare and sign, or approve for signature, enforcement settlements of \$50,000 or less, as appropriate.
- Negotiate settlements of enforcement actions.
- Provide Criminal Investigations Branch (CIB) with copies of all referrals to District Attorneys (DAs), City Attorneys (CAs) and the United States (U.S.) Attorney.
- Monitor AG, DA, CA, and U.S. Attorney enforcement referrals until adjudicated.
- Oversee return of violators to compliance on enforcement actions and/or

settlements.

- Submit data for entry into the inspection, complaint, and/or enforcement databases.

Inspector

- Determine and classify violations at the time of inspection.
- Issue Notice to Comply.
- Complete a Summary of Violations prior to preparing the inspection report.
- At the time of the inspection, provide persons inspected with clear information on observed violations and how to return to compliance.
- Prepare inspection report.
- Make recommendations to senior staff on the class of violations, the types of violators, the appropriate enforcement response and return to compliance dates, and the appropriate penalties.
- Prepare enforcement orders, statements of facts, enforcement referral packages, responses to compliance submittals, and related documents.
- Route draft orders for review and comment prior to issuance.
- Notify the State Regulatory Programs Division field office at least five days prior to issuance of the order so that the local jurisdiction can be notified.
- Work with violators to assist them to return to compliance.
- Conduct compliance follow-up to ensure violators return to compliance with the law and comply with all terms of enforcement settlement.
- Participate in negotiations and provide draft settlement language, as appropriate.
- Submit, for Section Chief approval, data for entry into the inspection, complaint, and/or enforcement databases.
- Notify CIB quarterly of the status of referrals of to the DA, CA, and U.S.

Attorney until adjudicated.

Investigator

- Conduct investigations of potential criminal activity related to hazardous waste management.
- Conduct investigations of cases that are pursued civilly or administratively.
- Write Reports of Investigation and Statements of Fact.
- Make recommendations to senior staff on the class of violations and type of violators for appropriate enforcement responses.
- Monitor referrals to the DA, CA, and U.S. Attorney until adjudicated by completing supplemental reports on a quarterly basis (including copies of all pertinent documents).

Office of Legal Counsel and Criminal Investigations (OLCCI)

- Review (or draft) and approve enforcement orders and prepare enforcement documents as required.
- Provide legal advice as needed in the development and settlement of enforcement actions.
- Represent DTSC and/or act as a liaison to the AG's Office, DAs, CAs, or the U.S. Attorney during enforcement actions, when appropriate. (Note: In cases with penalties under \$10,000, program staff will generally conduct informal conferences, unless legal assistance is requested or unless an attorney is representing the respondent.)
- Review and approve all referrals to the AG, DAs, CAs, and the U.S. Attorney, except D.A. referrals originating from the Criminal Investigations Branch.
- Provide other legal assistance, as required.
- Annually update and revise enforcement forms.

Criminal Investigations Branch (CIB)

- Investigate environmental crimes.

- Provide investigative advice and support as needed in the development of enforcement actions.
- Refer cases initiated by CIB to DAs, CAs, the U.S. Attorney, and the AG.
- Maintain a database to track all referrals made to DAs, CAs and the U.S. Attorney, and maintain a central file for all such referrals.

Task Force and Special Investigations Branch

- Support Cal/EPA in its cross-media investigation efforts.
- Support task forces around the State.
- Participate in multiple-media investigations, as appropriate.

Headquarters Branch, Statewide Compliance Division

- Generate reports from consolidated regional enforcement databases that track all administrative enforcement orders and civil referrals.

Regional Branches, Statewide Compliance Division

- Assign a docket number prior to issuing the order.
- Maintain the regional database of all docket numbers and information for administrative enforcement actions and civil referrals issued or initiated from the region.
- Input data to the inspection, complaint, and enforcement databases.

State Regulatory Programs Division (SRPD)

- Receive notifications of pending orders.
- Notify Certified Unified Program Agencies (CUPAs) and Participating Agencies (PAs) of pending orders.
- Enter data into the inspection, complaint, and/or enforcement databases that are maintained by the Statewide Compliance Division for cases that SRPD staff investigate.
- Exercise enforcement authority for the hazardous waste generator and onsite

treatment elements of the Unified Program.

- Conduct enforcement actions for cases that CUPAs decline.

## VI. CLASSIFYING VIOLATIONS AND VIOLATORS

There are many factors that affect the selection and execution of enforcement actions by DTSC. The primary factors are the class of the violation and the type of violator. It is DTSC's policy to take a formal enforcement action for Class I violations and for Significant Non-Compliers.

### Classes of Violations

For purposes of selecting appropriate enforcement responses, DTSC divides violations into three broad categories: Class I violations; Class II violations; and minor violations. The categories of Class I and Class II violations were initially adopted to coincide with the United States Environmental Protection Agency's (U.S. EPA) terminology. Those terms are defined in California Code of Regulations, title 22, section 66260.10. Subsequent legislation (Senate Bill 1899, Chapter 1217, Statutes of 1994) set forth in statute definitions of Class I and minor violations (Health & Safety Code §§ 25110.8.5 and 25117.6, respectively).

Health and Safety Code section 25110.8.5 defines "**Class I violation**" as follows:

"'Class I violation' means any of the following:

- (a) A deviation from the requirements of this chapter, or any regulation, standard, requirement, or permit or interim status document condition adopted pursuant to this chapter that is any of the following:
  - (1) The deviation represents a significant threat to human health or safety or the environment because of one or more of the following:
    - (A) The volume of the waste.
    - (B) The relative hazardousness of the waste.
    - (C) The proximity of the population at risk.
  - (2) The deviation is significant enough that it could result in a failure to accomplish any of the following:
    - (A) Ensure that hazardous waste is destined for, and delivered to, an authorized hazardous waste facility.
    - (B) Prevent releases of hazardous waste or constituents to the environment during the active or postclosure period of facility operation.
    - (C) Ensure early detection of releases of hazardous waste or constituents.
    - (D) Ensure adequate financial resources in the case of releases of

- hazardous waste or constituents.
- (E) Ensure adequate financial resources to pay for facility closure.
- (F) Perform emergency cleanup operations of, or other corrective actions for, releases.
- (b) The deviation is a Class II violation which is a chronic violation or committed by a recalcitrant violator."

Class I violations must be addressed through a formal enforcement action. Examples of potential Class I violations are provided in Appendix A to this document.

California Code of Regulations, title 22, section 66260.10 defines "**Class II violation**" as follows:

"'Class II Violation' means a deviation from the requirements specified in Chapter 6.5 of Division 20 of the HSC, or regulations, permit or interim status document conditions, standards, or requirements adopted pursuant to that chapter, that is not a Class I violation."

Examples of potential Class II violations are included in Appendix B to this document.

Health and Safety Code section 25117.6 defines "**minor violation**," which is a subset of Class II violations:

- "(a) 'Minor violation' means a deviation from the requirements of this chapter, or any regulation, standard, requirement, or permit or interim status document condition adopted pursuant to this chapter that is not a Class I violation.
- (b)(1) A minor violation does not include any of the following:
  - (A) Any knowing, willful, or intentional violation of this chapter.
  - (B) Any violation of this chapter that enables the violator to benefit economically from noncompliance, either by reduced costs or competitive advantage.
  - (C) Any Class II violation that is a chronic violation or that is committed by a recalcitrant violator.
- (2) In determining whether a violation is chronic or a violator is recalcitrant, for purposes of subparagraph (C) of paragraph (1), the department or the local officer or agency authorized to enforce this chapter, shall consider whether there is evidence indicating that the violator has engaged in a pattern of neglect or disregard with respect to the requirements of this chapter."

Except for minor violations corrected at the time of the inspection, [Health &

Safety Code §25187.8 (d)], minor violations must be addressed by a Notice to Comply, as specified in Health and Safety Code section 25187.8. Procedures for DTSC staff to implement this section of the law are detailed in Policy and Procedure for Inspections (EO-02-006-PP).

Examples of potential minor violations are included in Appendix B to this document.

### Types of Violators

A hazardous waste handler is classified as a “**Significant Non-Complier**” (SNC), according to the U.S. EPA’s Enforcement Response Policy, based on the nature of the violations. A SNC is a handler who:

- Has caused actual exposure or substantial likelihood of exposure to hazardous waste or hazardous constituents; or
- Is a chronic or recalcitrant violator [a handler who actively refuses to comply with the regulatory requirements or has engaged in a pattern of neglect or disregard for the regulatory or statutory requirements]; or
- Substantially deviates from the terms of a permit, order, settlement document, or decree by not meeting the requirements in a timely manner and/or by failing to perform work as required by the terms of permits, orders, settlement agreements, or decrees; or
- Substantially deviates from statutory or regulatory requirements.

SNCs represent the category of violators that merit the most stringent and timely enforcement response. DTSC will take formal enforcement action against all SNCs with Class I and II violations. SNCs will be tracked to ensure timely and appropriate enforcement and compliance. Examples of SNCs are provided in Appendix C to this document.

## **VII. ENFORCEMENT RESPONSE OPTIONS**

### Formal Enforcement Actions

A formal enforcement action is an action that mandates compliance and initiates a civil, criminal or administrative process that results in an enforceable agreement or order. Enforceable means the instrument creates an independent, affirmative obligation to comply and imposes sanctions for the failure to comply. Sanctions include fines and penalties as well as other tangible obligations that are imposed

upon the regulated community. Examples include administrative orders and civil orders or judgments.

### **Criminal Enforcement Response Options**

Criminal prosecution provides the strongest punishment and greatest deterrent against unlawful conduct that harms or poses a threat of serious harm to the public health and environment. Criminal actions are generally referred to DAs or CAs, but may also be referred to the AG, the Circuit Prosecutor, or the U.S. Attorney. Criminal cases are filed in the name of the People. DTSC provides technical support to the offices prosecuting these cases.

### **Civil and Administrative Enforcement Response Options**

DTSC has several non-criminal enforcement options that can be matched to the severity of the violations to be addressed or the needs of litigation. Those options include, in descending order of stringency:

- **Civil Actions.** Civil actions are generally referred to the AG who files these cases as DTSC's attorney.
- **Administrative Enforcement Actions.** DTSC has statutory authority to take administrative action to order correction of violations and to impose penalties.

### Informal Enforcement Actions

An informal action is an action other than a formal enforcement action that notifies the regulated business of its non-compliance and establishes a date by which that non-compliance is to be corrected.

Examples of these include a letter, Summaries of Violations, and Notices to Comply [see Health & Safety Code §§25185 (c)(1) and 25187.8]. Informal actions are generally utilized when the situation involves only minor and/or Class II violations, or where other actions are being simultaneously pursued. When other enforcement actions are being pursued, informal actions will serve to notify the violator of the violations and required corrections. Informal actions do not impose sanctions.

### Referral To Another Agency

Different considerations come into play in deciding whether to refer a case to another agency. Listed below are some of the factors indicating that referral to another agency is appropriate.

- **U.S. EPA.** Referral of a case to U.S. EPA is appropriate where U.S. EPA is taking enforcement action regardless of DTSC's action, where the State does not have authority to enforce certain federal requirements [e.g., loss of interim status under the Hazardous and Solid Waste Amendments of 1984 to the Resource Conservation and Recovery Act (RCRA) of 1976], or where, by mutual agreement, the agencies determine that the case is best addressed by U.S. EPA.
- **Deputy Secretary for Law Enforcement and Counsel, Cal/EPA.** Referral to the Deputy Secretary may be appropriate for cases that have multiple-media implications or cases that have cross-board/department/office implications necessitating Cal/EPA involvement for investigation and coordination purposes.
- **Other Cal/EPA Departments or Boards.** Referral of a case to another Cal/EPA department or board is appropriate where that Cal/EPA department or board has overlapping jurisdiction, is taking action, and has a strong interest in the case, or where DTSC does not have the authority to enforce and the case must be referred to another Cal/EPA department or board with the appropriate jurisdiction for full enforcement.
- **CUPAs.** Referral of a case to a CUPA may be appropriate where the CUPA has jurisdiction or has received authorization, such as for enforcement cases involving certain generator activities or on-site, permitted activities.
- **Other Agencies.** Referrals to agencies not mentioned above may be made where appropriate. Any such referral should be made only upon approval of the Branch Chief.

#### Other Administrative Actions

#### **Temporary Suspension, Revocation, or Denial of a Grant of Authorization**

DTSC may deny, suspend, or revoke a permit, registration, license, etc., pursuant to Health and Safety Code section 25186, if the applicant or holder (or in the case of a business concern, any trustee, officer, director, partner, or any person holding more than 5% of the equity in or debt liability of that business concern) has engaged in certain acts, including:

- Violating the HWCL, RCRA, or other specified environmental statutes, if the violation shows a repeating or recurring pattern or may pose a threat to public health or safety or the environment;

- Aiding, abetting, or permitting such violations;
- Violating a relevant administrative or judicial order;
- Misrepresenting or omitting significant information in the application or subsequent submissions for authorization;
- Activities resulting in final criminal convictions significantly related to the fitness of the permit applicant or holder to perform under the permit; and/or
- Activities resulting in the revocation or suspension of any other relevant permit, registration, license, etc., held by the applicant or holder.

In addition, DTSC may temporarily suspend a permit to prevent an imminent and substantial danger to public health or safety or to the environment.

Permit denials, suspensions, and revocations are extremely strong enforcement responses because they may result in the permit applicant or holder losing the legal right to operate a hazardous waste business. Therefore, permit denials, suspensions, and revocations are only considered when the acts of the permit applicant or holder are criminal, pose a substantial threat to public health or safety or the environment, or show a clear unwillingness or inability to comply with environmental laws. In an appropriate case, however, enforcement staff should recommend that DTSC deny a permit application or suspend and/or revoke a permit. These actions can proceed concurrently with civil or criminal actions because the former are licensing issues.

Pursuant to Health and Safety Code sections 25189.3(c) and (d), DTSC may suspend the permit of any facility for nonpayment of a penalty assessed or for delinquent payment of the penalty.

## **VIII. SELECTING AN APPROPRIATE ENFORCEMENT RESPONSE**

Choosing an appropriate enforcement response requires that a variety of factors be considered. Factors to be considered include the facts of the particular case, the interest and capacity of the various agencies to handle the case, the class of the violations involved and the type of violator.

Among the factors that should be considered are:

- The actual or potential harm to human health and safety or to the environment;

- The extent of deviation from legal requirements;
- The violator's compliance history;
- The violator's good faith efforts to comply;
- The prophylactic effect on the violator and on the regulated community;
- Any unusual circumstances and/or mitigating factors; and
- Litigation factors such as the quality of the evidence and the need for judicial discovery and enforcement tools.

The weight given to various factors in particular cases will vary depending on the circumstances. Where there are violations of varying severity or class by the same person, all violations should generally be included in one enforcement action based on the highest class of violation.

Cases with Class I violations will be evaluated for determination of the appropriate enforcement response in consultation with OLCCI at the time the inspection report is finalized. It is DTSC's policy to use a formal enforcement response for Class I violations and SNCs, as defined in Section VI of this policy.

The following provides **general** guidance to select the appropriate enforcement response. The selection of an appropriate enforcement response depends on the variety of circumstances that can surround a given violation or violator.

#### Criminal Action

Cal/EPA issued a memorandum "Cal/EPA Response to Suspected Criminal Violations of Environmental Law," dated August 16, 1993, which should be consulted for assistance in determining whether criminal enforcement action should be pursued. To summarize from that document, factors indicating that a criminal action should be pursued include:

- Violations are severe;
- Acts are intentional;
- Civil or administrative remedies are inadequate;
- Evidence is sufficient to support the criminal burden of proof; and

- The prosecutor is willing and able to prosecute the case.

DTSC will pursue criminal actions through referrals to a DA, CA, the AG, the Circuit Prosecutor or other appropriate prosecutors.

#### Civil Action

The factors indicating that a civil action should be pursued include:

- Need for injunctive relief to obtain compliance;
- One or more Class I violations;
- Multi-jurisdictional issues;
- Issues of statewide significance;
- Existing DTSC or CUPA administrative enforcement orders or settlements that were violated;
- Need to utilize judicial discovery;
- Major cleanup activity;
- Cases where the city or county is a possible defendant or where local factors make prosecution at the State level preferable (e.g., major employer in small county); and
- The desire to establish a judicial precedent.

DTSC will pursue civil actions through referrals to the AG, or other prosecutors or agencies as appropriate. Prior to referral, an enforcement action sign-off sheet should be completed noting any necessary signatures for each referral. The enforcement action sign-off sheet (enforcement form enf03.wpd) is located on the Wide Area Network at t:\forms\enforcement. Referral packages will be forwarded after review and sign off by staff, managers, and OLCCI as detailed in enforcement action sign-off sheets.

#### Administrative Enforcement Order

If a formal enforcement action is appropriate, but the situation does not meet the criteria for criminal or civil action, or for referral to another agency, then use of DTSC's administrative enforcement order authority is indicated.

Penalties to be assessed in administrative enforcement orders shall be calculated utilizing California Code of Regulations, title 22, division 4.5, article 3, Assessment of Administrative Penalties regulations, sections 66272.60 through 66272.69.

Prior to issuance of administrative enforcement orders, an enforcement action sign-off sheet should be completed noting any necessary signatures. The enforcement action sign-off sheet (enforcement form enf03.wpd) is located on the Wide Area Network at t:\forms\enforcement.

#### Informal Enforcement Action

Informal actions are utilized for Class II and minor violations, where mandated by statutory provisions and carried out concurrently with other enforcement options. When other enforcement actions are being pursued, informal actions will serve to notify the violator of the violations and required corrections. An informal action should never be pursued as the sole action for a Class I violation or for a SNC.

DTSC utilizes informal actions in an effort to achieve compliance where formal enforcement action is not appropriate. If an informal action fails to achieve compliance, then selection of a formal action is appropriate.

Health and Safety Code section 25185 mandates that DTSC provide a Summary of Violations at the conclusion of an inspection, prepare an inspection report, provide a copy of the inspection report to the operator of the facility, and reply to requests and responses made by the operator. Further, Health and Safety Code section 25187.8 requires an inspector to issue a Notice to Comply before leaving the facility for minor violations detected in the course of conducting an inspection of a facility. Other informal actions may be pursued as deemed appropriate by program management for a given circumstance.

DTSC will conduct reinspections or other monitoring to confirm compliance in all cases where only informal actions have been taken.

### **IX. TIMELINESS OF ENFORCEMENT ACTIONS**

To meet DTSC's goals of returning violators to compliance and initiating and completing enforcement actions in a timely manner, target dates for completion of certain steps in the enforcement process have been established.

### Inspection Reports

DTSC staff should complete all inspection reports as soon as possible following the completion of the inspection, and in no case more than 60 calendar days after the day a violation is identified, regardless of the duration of the inspection or record review, or the stage in the inspection when the violation is identified. The procedures for completing inspections are contained in the Policy and Procedure for Inspections EO-02-006 PP. An inspection report is complete when it is signed by the inspector and approved by the inspector's Section Chief and Branch Chief.

Under Health and Safety Code section 25185, DTSC is **required** to provide a copy of the inspection report to the person inspected within 5 days of completing the inspection report, and in no case more than 65 days from the date of the inspection, unless specific statutory exemptions apply.

### Initiating Enforcement Actions

DTSC staff should, in all cases, initiate formal enforcement action as early as possible, and in no case later than 180 days after the date of the inspection. Initiation of an enforcement action means issuing an administrative enforcement order (excluding a draft order) or final settlement document, or referring the case for appropriate action to the DA, CA, AG, U.S. Attorney, the Circuit Prosecutor, or to another agency.

When DTSC initiates an enforcement order, rather than referring the case, DTSC will: (1) mail a draft "Enforcement Order" and "Stipulation and Order" to the respondent by the 135th day after the inspection; (2) offer the respondent an opportunity to settle the case prior to the 180th day after the inspection; and (3) either finalize a settlement, or issue an administrative enforcement order to the respondent by the 180th day after the inspection.

This approach will not be used for violations of Phase 1 environmental assessment requirements. DTSC will issue the order rather than send a draft order. This approach will also not be used for chronic violators, large and complicated cases, or where special circumstances make it inappropriate (as approved by the Branch Chief). "Special circumstances" may include: a violator who is uncooperative, has a questionable compliance history, or has been unwilling to negotiate or meet with the DTSC; or gross contamination that requires extensive site characterization.

After referral to the AG or DA, an administrative enforcement order should be issued or a civil complaint should be filed within 90 days of referral, unless an extension is approved by the Branch Chief.

### Settling Enforcement Actions

In all administrative enforcement actions, a hearing date should be requested immediately in order to avoid delay if the case is not settled, unless a delay in setting the hearing is approved by the Branch Chief.

In all civil enforcement actions if DTSC and the respondent cannot settle the potential civil action within 90 days of initiating negotiations, a complaint should be filed unless an extension is approved by the Branch Chief.

## **X. SETTLEMENT PHASE**

Although DTSC must always be prepared to litigate any enforcement action, it is DTSC's practice to encourage each respondent to enter into settlement discussions with DTSC in order to settle the case expeditiously and preclude the need for litigation.

### Admission of Violations

Each enforcement action can include a number of violations. Some violations may be egregious, while other violations may be less significant. It is not equally important or worthwhile to DTSC to require admissions for all violations. It is DTSC's practice to require admission language for the most egregious violations, those violations that endanger public health and safety or the environment, and serious repeat violations. In these cases, the Branch Chief or Division Chief will decide whether to require that the violations be admitted.

### Use of Supplemental Environmental Projects in Settlement Agreements

In some cases, as part of a settlement agreement, DTSC may agree that violators undertake Supplemental Environmental Projects (SEPs)<sup>1</sup> such as pollution prevention/reduction measures to reduce risk to public health and the environment. These SEPs may offset penalties that result from civil or administrative actions initiated by DTSC. DTSC staff should consult with the Office of Pollution Prevention and Technology Development or other appropriate offices when selecting and establishing SEPs for a given case. SEPs apply to public agencies and private parties, are considered by DTSC on a case-by-case basis, and are approved at the discretion of DTSC.

The settlement agreement should accurately and completely describe the SEP to include the specific actions that the respondent will perform and to verify that the respondent has completed the project on time. Verification may include the submission of periodic reports to DTSC. Those reports may be prepared by an

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outside auditor/consultant; however, the respondent remains responsible for any costs incurred in the preparation of such periodic reports. A final report, signed by an appropriate corporate officer of the respondent's company, demonstrating the completion of the SEP and documenting SEP expenditures should be submitted to DTSC.

DTSC is currently developing a SEP policy in conjunction with Cal/EPA in order to resolve inconsistencies between the current Cal/EPA SEP policy (December 15, 1998) and the SEP policy of U.S. EPA (effective May 1, 1998). Until DTSC has finalized a new SEP policy, the Cal/EPA and U.S. EPA SEP policies should be used to determine the appropriateness and types of SEPs considered as part of the settlement phase in enforcement actions. This enforcement response policy and procedure will be amended and updated when DTSC's new SEP policy is finalized.

<sup>1</sup>Prior to the revision of this enforcement response policy and procedure, DTSC's policy in settling enforcement actions was to consider the use of environmental credits as outlined in EO-92-004-MM, "Use of Environmental Credits in Settlement Agreements." The management memo concerning environmental credits was rescinded May 16, 2001.

**CONTACT:**

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***This policy and procedure is intended to provide guidance on enforcement response activities. However, the policy and procedure does not replace or supersede relevant statutes and regulations. The information contained in this policy and procedure is based upon the statutes and regulations in effect as of the date the policy and procedure was signed. Interested parties are advised to keep apprised of subsequent changes to relevant statutes and regulations.***

***This policy and procedure expires five years from the date of signature.***

July 25, 2002  
Date

[original signed by Edwin F. Lowry]  
Edwin F. Lowry  
Director  
Department of Toxic Substances Control

Appendix A

**EXAMPLES OF CLASS I VIOLATIONS**

DTSC considers the following to be examples of potential Class I violations, depending on the circumstances.

1. A release or serious threat of release of hazardous waste to the environment, or violation that causes a release or serious threat, for example:
  - Incompatible wastes stored or accumulated adjacent to each other with no physical barrier for separation.
  - Waste stored, accumulated or transported in an incompatible, damaged, or deteriorated container.
  - Evidence that a release to soil or water has occurred.
  - Failure to transfer wastes from deteriorated containers into sound containers.
  - Ongoing releases of metal dusts to surrounding properties.
2. A violation that involves the failure to assure that groundwater will be protected, for example:
  - Failure to implement regularly scheduled sampling activities in a groundwater monitoring program.
  - Failure to analyze all required parameters in a groundwater monitoring program.
  - Failure to perform the required statistical analyses of monitoring data.
3. A violation that involves the failure to assure that proper closure and postclosure activities will be undertaken, for example:
  - Failure of an owner/operator to develop closure or postclosure plans.
4. A violation that involves the failure to assure that hazardous wastes will be destined for and delivered to an authorized facility, for example:
  - Failure to manifest hazardous waste.

- Use of an unregistered hazardous waste transporter.
  - Treatment, storage, or disposal at an unauthorized point.
5. Class I or II violations by a recalcitrant or chronic violator, including one who is violating outstanding enforcement orders, for example:
- Failure to correct violations in accordance with a schedule of compliance.
6. A violation that involves failure to establish or maintain appropriate financial mechanisms to assure closure, postclosure, and liability coverage, for example:
- Failure by an owner/operator to establish or maintain a financial assurance instrument.

Note: This is not intended to be an exhaustive list of potential Class I violations.

Appendix B

**EXAMPLES OF CLASS II VIOLATIONS**

Examples of potential Class II violations, depending on circumstances, are as follows:

- Failure of a generator to keep a copy of each manifest for at least three years.
- Failure to maintain a copy of the closure plan at the facility.
- Failure to submit the annual report in a timely manner.
- Failure to maintain an adequate contingency plan.
- Failure to adequately document hazardous waste training.
- Failure to note in the inspection log the date and nature of any repairs.
- Small deficiencies in other record keeping requirements.
- Failure to update closure costs for inflation (although this may be a Class I violation if such costs are substantial).

Note: This is not intended to be an exhaustive list of potential Class II violations. Minor violations are a subset of Class II violations. These examples would also constitute minor violations, unless a particular occurrence meets one or more of the exceptions to the definition of minor violation (Health & Saf. Code §25117.6).

Appendix C

**EXAMPLES OF SIGNIFICANT NON-COMPLIERS**

Depending on the circumstances, examples of Significant Non-Compliers include, but are not limited to, those who:

- Repeat Class I violation from a preceding inspection within 3 years.
- Fail to comply with an enforcement order.
- Repeat the same Class II violation within 3 years.
- Operate a facility without a permit or other grant of authorization.
- Dispose of hazardous waste at an unauthorized point.
- Fail to manage ignitable, reactive, or incompatible wastes as required by California Code of Regulations, title 22, sections 66264.17.
- Fail to have a closure or postclosure plan or cost estimates for a treatment, storage, or disposal facility.
- Fail to establish or maintain financial assurance for closure and/or postclosure care.
- Fail systematically to comply with manifest requirements or deviate substantially from manifesting requirements.
- Fail systematically to follow container/tank labeling requirements.
- Systematically use containers in poor condition.
- Transport hazardous waste without being a registered transporter.